

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

File No.: EB-04-ST-263

Butterfield Broadcasting Corporation

NAL/Acct. No.: 200532980003

FRN: 0004281150

Former Licensee of AM Station KULE

Ephrata, Washington

Facility ID #4041

FORFEITURE ORDER

Adopted: December 21, 2005**Released: December 23, 2005**

By the Regional Director, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* ("Order"), we issue a monetary forfeiture in the amount of seven thousand dollars (\$7,000) to Butterfield Broadcasting Corporation ("Butterfield"), former licensee of AM station KULE,¹ in Ephrata, Washington, for willful and repeated violation of Section 73.49 of the Commission's Rules ("Rules").² On December 14, 2004, the Enforcement Bureau's Seattle Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL") in the amount of \$7,000 to Butterfield after determining that it had failed to effectively enclose its AM broadcast tower. In this *Order*, we consider and reject Butterfield's arguments that the facts in the *NAL* are incorrect; that the fence was effective; that the *NAL* overstates the size of the gap in the fence; and that Butterfield has an overall history of compliance.

II. BACKGROUND

2. On July 12, 2004, an agent from the Seattle Office conducted an inspection of the AM antenna tower used at Butterfield's station KULE. According to its license, the KULE antenna tower is series fed and, therefore, required to be fenced. Upon inspection of the antenna tower, the field agent found that the gate at the perimeter of the antenna site was broken and open. The agent then inspected the KULE antenna tower base fence. The agent found that, on the north and west sides of the base fence, the fence and fence frame extended almost to the ground. On the east and south sides of the fence, however, the ground sloped downward. The fence did not compensate for the slope of the ground, creating a 12 to 18 inch gap between the ground and the start of the fence. This gap, which ran along the entire length of the 20 foot east side and the 10 foot south side, was large enough to allow access to the interior of the fence and the base of the tower.

3. The next day, on July 13, 2005, the Seattle agent contacted KULE and conducted an inspection of the station and the tower site, accompanied by the KULE station manager. The agent informed the KULE station manager that the perimeter gate was broken and that the antenna tower base fence did not effectively enclose the base of the antenna tower. The KULE station manager stated that he

¹On November 18, 2004, the Commission assigned the KULE(AM) license from Butterfield to Bustos Media of Washington, LLC. See Application No. BAL-20040827AAU. The transaction was consummated on January 21, 2005.

²47 C.F.R. § 73.49.

would fix the base fence.

4. On August 9, 2004, an agent from the Seattle Field Office again conducted an inspection of the KULE antenna tower. The field agent found that the antenna tower base fence was not repaired to effectively enclose the antenna tower.

5. On December 14, 2004, the Seattle Office issued a *NAL* in the amount of \$7,000 to Butterfield.³ In the *NAL*, the Seattle Office found that Butterfield apparently willfully and repeatedly failed to effectively enclose the KULE AM broadcast tower. Butterfield filed a response to the *NAL* on January 14, 2005 ("*Response*"). In its *Response*, Butterfield states that the description in the *NAL* was not entirely accurate; that the fence surrounding the KULE(AM) tower was effective; that the size of the gap in the fence is overstated in the *NAL*; and that, given Butterfield's recent compliance history with KULE(AM), a \$7,000 forfeiture is not warranted.

III. DISCUSSION

6. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,⁴ Section 1.80 of the Rules,⁵ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.⁶ In examining Butterfield's response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁷

7. Section 73.49 of the Rules states that antenna towers having radio frequency potential at the base (series fed, folded unipole, and insulated base antennas) must be enclosed within effective locked fences or other enclosures. Individual tower fences need not be installed if the towers are contained within a protective property fence.⁸ The KULE AM antenna tower is series fed.

8. We first address Butterfield's allegation that the facts recited in the *NAL* "are not entirely accurate." Butterfield states that there are two fences, a perimeter fence, covering at least nine square miles and containing the tower sites and antennas for at least five radio stations, two cellular companies, numerous translator stations, wireless internet providers, and communications facilities for the county's 911 operation. The other fence, Butterfield explains, is the antenna base fence, which exclusively surrounds the KULE AM antenna tower. Butterfield acknowledges that the perimeter fence, a three-strand barbed wire fence with at least one broken gate, did not meet the requirements of Section 73.49. Butterfield asserts, however, that the antenna base fence did meet the requirements of Section 73.49.

9. Butterfield asserts that Butterfield personnel accessed the KULE site via a different, unbroken, gate in the perimeter fence and did not use the broken perimeter fence gate. Therefore, Butterfield argues, given the apparent multiple users of the site and the gates, it should be relieved of any liability for the maintenance of the broken perimeter fence gate. We agree with Butterfield that there were two fences at the site: a perimeter fence and a base fence around the AM tower. We note, however,

³*Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200532980003 (Enf. Bur., Western Region, Seattle Office, released December 14, 2004).

⁴47 U.S.C. § 503(b).

⁵47 C.F.R. § 1.80.

⁶12 FCC Rcd 17087 (1997), recon. denied, 15 FCC Rcd 303 (1999).

⁷47 U.S.C. § 503(b)(2)(D).

⁸47 C.F.R. § 73.49.

that the Seattle Office's determination of Butterfield's apparent liability under Section 73.49, was not because of the ineffective perimeter fence, but because of the ineffective AM tower fence which was found at the KULE AM tower. As stated in Section 73.49, "individual tower fences need not be installed if the towers are contained within a protective property fence."⁹ Because the perimeter fence was not effective, the base fence around the AM tower must be effective.

10. Butterfield next argues that the KULE AM tower fence was effective and describes it as being six to six and one-half feet tall consisting of two by three inch open-mesh screening with posted radiation hazard warnings. Butterfield states that to breach the fence, an individual would have to try to crawl under or climb over the fence and that the Commission has never interpreted the phrase "effective fence" to mean "impenetrable by a determined trespasser." In adopting the *Report and Order* promulgating the most recent amendment of Section 73.49, the Commission stated that "a fencing requirement is necessary to protect the general public."¹⁰ In that *Report and Order*, the Commission does not discuss the Section 73.49 fencing requirement in terms of trespassers, nor has Butterfield directed us to any Commission decision concerning Section 73.49 that requires different protection for trespassers than for the general public.¹¹ Section 73.49 requires that the fence must be effective. The Enforcement Bureau has repeatedly found fencing that allows access to the antenna to be ineffective.¹²

11. Butterfield also argues that the fence was effective because the gap was only 11 inches, and not the 12 to 18 inches noted by the Seattle agent.¹³ Butterfield states that given the size of the gap, and the warning signs "[n]o one, adult or child, could have any question that they should not go inside the fence, and to get inside they would have to go to extraordinary means." As noted in the *NAL*, the agent found that the range of the gap increased in places as the fence did not compensate for the slope of the property, and that the gap was large enough to allow access to the AM tower. During the inspection on July 12, 2004, the Seattle agent easily slid under the fence and noted that one part of the gap was 11 to 12 inches increasing to 18 inches as the property sloped downward. We therefore find that the fence was not effective.

12. Finally, Butterfield argues that the \$7,000 forfeiture should be reduced as Butterfield has had only one prior violation during the time it held the KULE license. Specifically, Butterfield was assessed a \$2,000 forfeiture for willful and repeated violation of Section 73.3526(e)(1).¹⁴ Because

⁹47 C.F.R. § 73.49.

¹⁰*Review of the Technical and Operational Regulations of Part 73, Subpart A, AM Broadcast Stations*, 59 Rad. Reg. 2d (Pike & Fischer) 927, ¶6 (1986) ("Report and Order").

¹¹We note that this is consistent with guidance given by the Commission's Office of Engineering and Technology ("OET") concerning compliance with the Commission's radiofrequency ("RF") radiation rules. In *OET Bulletin 65: "Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields,"* OET recommends that applicants for broadcast stations take into account, when determining their compliance with the Commission's RF rules, whether "[h]igh RF levels are produced at ground level in an area which could reasonably be expected to be used by the public (including trespassers)." *OET Bulletin 65* at 84.

¹²See, e.g., *M.B. Communications, Inc.*, 20 FCC Rcd 9536 (EB 2005) (existence of an 18 inch gap below an AM tower fence contributed to unimpeded access to the AM tower).

¹³In an affidavit, the KULE station manager asserts that the gap was 11 inches when he prepared to repair the gap in the fence, after the July 13, 2004 inspection by the Seattle agent. The station manager also asserts that the inspector did not convey any sense of urgency, and that the station personnel assumed that by fixing the fence within 30 days, it was complying with the inspector's wishes. Butterfield was on notice that the KULE AM tower fence was not in compliance with Section 73.49 as of the July 13, 2004 inspection. When the Seattle agent returned on August 9, 2004, 27 days later, the gap remained thus belying Butterfield's claim that it "promptly took steps to extend the fence to the ground." Butterfield finally repaired the fence on August 14, 2004.

¹⁴*Butterfield Broadcasting Corporation*, 19 FCC Rcd 19473 (EB 2004).

Butterfield was previously the subject of an enforcement action, we find Butterfield does not have an overall history of compliance and that reduction of the assessed forfeiture amount is not warranted.¹⁵

13. We have examined Butterfield's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that Butterfield willfully and repeatedly violated Section 73.49. Considering the entire record and the factors listed above, we find that neither reduction or cancellation of the proposed \$7,000 forfeiture is warranted

IV. ORDERING CLAUSES

14. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"), and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules, Butterfield Broadcasting Corporation **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$7,000 for willfully and repeatedly violating Section 73.49 of the Rules.¹⁶

15. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁷ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911- 6106. Requests for full payment under an installment plan should be sent to: Associate Managing Director – Financial Operations, Room 1A625, 445 12th Street, S.W., Washington, D.C. 20554.¹⁸

16. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to Butterfield Broadcasting Corporation, 706 Butterfield Road, Yakima, Washington, 98901; and to Anne Paxson, Esquire, Borsari and Paxson, Suite 100, 4000 Albemarle Street, N.W., Washington, D.C. 20016.

FEDERAL COMMUNICATIONS COMMISSION

Rebecca L. Dorch
Regional Director, Western Region
Enforcement Bureau

¹⁵See, e.g., *Petracom of Texarkana*, 19 FCC Rcd 8096 (EB 2004).

¹⁶47 U.S.C. § 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 73.49.

¹⁷47 U.S.C. § 504(a).

¹⁸See 47 C.F.R. § 1.1914.